No. 77-716

In the Supreme Court of the United States

OCTOBER TERM, 1977

MAX CLELAND, ADMINISTRATOR OF THE VETERANS ADMINISTRATION, ET AL., APPELLANTS

v.

NATIONAL COLLEGE OF BUSINESS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA

JURISDICTIONAL STATEMENT

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CITATIONS

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OPINION BELOW

The opinion of the district court (App. A, *infra*, pp. 1a–33a) is reported at 433 F. Supp. 605.

JURISDICTION

The judgment and order of the district court, declaring unconstitutional and enjoining the defendants from enforcing 38 U.S.C. 1673(d) as amended by Pub. L. 94–502, 90 Stat. 2387, and 1789(c), as amended by Pub. L. 94–502, 90 Stat. 2401, was entered on June 24, 1977 (App. B, *infra*, pp. 34a–35a). A notice of appeal to this Court was filed on July 22, 1977 (App. C, *infra*,

p. 36a). On September 19, 1977, Mr. Justice Blackmun extended the time for docketing the appeal to and including October 20, 1977, and on October 10, 1977, he further extended the time to and including November 19, 1977. Jurisdiction is conferred on this Court by 28 U.S.C. 1252.

QUESTION PRESENTED

Whether 38 U.S.C. 1673(d) and 1789(c), as amended, which provide, with some exceptions, that the Administrator of the Veterans Administration, in reviewing applications for educational benefits, shall not approve a veteran's enrollment in courses that have been in operation for less than two years or in which more than 85 percent of the enrolled students receive either federal tuition assistance or assistance from the school itself, are consistent with the Due Process Clause of the Fifth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be * * * deprived of * * * property, without due process of law.

The relevant provisions of 38 U.S.C. (Supp. V) 1673(d), as amended by Section 205 of Pub. L. 94–502, 90 Stat. 2387, and of 38 U.S.C. (Supp. V) 1789, as amended by Section 509 of Pub. L. 94–502, 90 Stat. 2401, are set forth at App. D, *infra*, pp. 37a–39a.

STATEMENT

1. Pursuant to 38 U.S.C. (and Supp. V) 1651 *et seq.*, veterans and other individuals meeting prescribed

conditions can qualify for veterans' educational assistance benefits. The purposes of this educational program are to make service in the Armed Forces of the United States more attractive, to extend the benefits of higher education to qualified and deserving young persons who might not otherwise be able to afford such an education, and to restore educational opportunities and status which an individual may have lost because of his military service. 38 U.S.C. 1651.[1]

A veteran who wishes to initiate a program of education is required to file an application with the Administrator of the Veterans Administration. Before the Administrator approves such an application, he must determine whether the veteran is eligible for the assistance and, if so, whether his proposed program of education meets certain statutory requirements. 38 U.S.C. (Supp. V) 1671.[2]

Two of those provisions, commonly referred to as the 85–15 requirement and the two-year rule, are at issue here. The 85–15 requirement, which is imposed by 38 U.S.C. 1673(d), as amended, requires the Administrator to disapprove an application for benefits if an eligible veteran enrolls in any course[3] "for any period

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[1] Eligible veterans are entitled to varying amounts of educational assistance depending in part on the amount of time spent on active duty. 38 U.S.C. (and Supp. V) 1661. Each eligible veteran is permitted to select the educational program that he believes will best assist him in attaining an educational, professional, or vocational objective. 38 U.S.C. 1670.

[2] Receipt of educational benefits is conditioned on the veteran being enrolled in a course that has been approved by the Administrator or the appropriate state approving agency. 38 U.S.C. (Supp. V) 1683 and 1772.

[3] Exceptions are made for courses for the educationally disad-

during which the Administrator finds that more than 85 percentum of the students enrolled in the course are having all or part of their tuition, fees, or other charges paid to or for them by the educational institution, by the Veterans' Administration under this title and/or by grants from any Federal agency."[4] The 85–15 requirement does not prohibit the approval of further benefits to a veteran "already enrolled" in a particular course. 38 U.S.C. 1673(d), as amended. Moreover, the Administrator may waive the requirement if he determines that to do so would be in the interest of both the veteran and the federal government (*ibid.*).

The two-year rule is imposed by 38 U.S.C. 1789, as amended by Pub. L. 94–502.[5] It requires the Administrator to disapprove the enrollment of an eligible veteran in any course that has been offered for less than two years. As a general matter, this rule does not apply

vantaged, farm cooperative training courses, and certain courses offered by an educational institution under a contract with the Department of Defense. See 38 U.S.C. (and Supp. V) 1690 *et seq.* and 1789(b)(6), as amended.

[4] The statute was amended, immediately before this litigation began, by Section 205 of Pub. L. 94–502. Prior to the amendment, the 85–15 requirement applied only to courses offered by proprietary educational institutions that did not lead to a standard college degree, and students receiving nonveterans' federal educational benefits were not included in the 85 percent quota. The forerunner of the present 85–15 requirement was enacted in 1952 and applied only to non-accredited courses below the college level offered by proprietary institutions. See Pub. L. 82–550, 66 Stat. 667.

[5] Prior to the enactment of Pub. L. 94–502, the two-year rule was applied somewhat less broadly. Pub. L. 94–502 extended the two-year rule to public or tax supported schools outside the taxing jurisdiction and to branches and extensions of proprietary educational institutions beyond normal commuting distance from the main institution. The forerunner of this type of provision was included in Pub. L. 82–550, 66 Stat. 667.

to courses offered in a public or other tax-supported educational institution within the area of the taxing jurisdiction; to courses offered by an educational institution that has been in operation for at least two years, if they are similar in character to instruction previously given; to courses offered by a nonprofit college which are recognized for credit toward a standard college degree; and to certain other courses. 38 U.S.C. 1789(b) and (c)(1), as amended. Notwithstanding these exceptions, however, the two-year rule does apply to courses offered at branches and extensions of proprietary educational institutions located beyond the normal commuting distance of the institution. 38 U.S.C. 1789(c)(2), as amended.

2. Appellee National College of Business, a proprietary educational institution, and four veterans eligible for veterans' educational benefits instituted this action in the United States District Court for the District of South Dakota, challenging the constitutionality of both the 85–15 requirement and the two-year rule.[6] The court held that none of the individual plaintiffs had standing (App. A, *infra,* pp. 12a–15a). The court determined, however, that appellee has a significant financial investment in veterans' educational programs and would suffer "direct and immediate economic injury" from application of either the 85–15 requirement or the

[6] Although the plaintiffs also challenged 38 U.S.C. 1724, as amended by Section 307 of Pub. L. 94–502, 90 Stat. 2390, which pertains to the discontinuance of educational assistance allowances, the district court did not rule on the constitutionality of that provision because it concluded that none of the plaintiffs had standing to challenge it (App. A, *infra,* pp. 12a–15a, 16a). Accordingly, the constitutionality of that provision is not now at issue before this Court.

two-year rule (App. A, *infra,* pp. 15a–16a). The court acknowledged that there was a rational basis for both the 85–15 requirement and the two-year rule, which were designed "to reduce fraudulent and wasteful expenditures of money on bogus courses * * *" (App. A, *infra,* pp. 24a–25a, 31a). The court nevertheless concluded that more than a rational basis was necessary to support their constitutionality, *i.e.,* that a " 'middle tier' approach" was required (App. A, *infra,* pp. 28a, 30a):

> The case now before the Court is one where the interest at stake [*i.e.,* veterans' educational benefits] "approaches fundamental and personal rights." * * * The scrutiny required when such interests are at stake may not be the strictest but it is much more than the minimum.

Applying such a "middle tier" standard, the court held the statutes unconstitutional (App. A, *infra,* p. 31a):

> The challenged legislation could indeed eliminate bogus courses, but in the process, courses, and perhaps institutions, which especially serve veterans will be eliminated also. The challenged statutes are an example of legislative overkill. Fraud and waste are eliminated at the cost of eliminating quality educational opportunities for veterans.[7]

[7] The court further observed (App. A, *infra,* p. 31a):

> We are cognizant of the fact that social legislation in the past has not been subjected to as critical a level of scrutiny as that which we have herein applied. *See Dandridge v. Williams,* 397 U.S. 471, * * *. If the level of judicial scrutiny applied in cases such as *Dandridge v. Williams* is the law for this case, then the decision should be different.

THE QUESTION IS SUBSTANTIAL

This appeal presents an important question regarding the constitutional validity of statutes designed to minimize the risk that veterans' educational benefits will be wasted on programs of little value.[8] The district court acknowledged that these statutory provisions, which generally restrict the availability of veterans' educational assistance to established courses that have attracted a substantial proportion of non-subsidized students, are reasonably related to the legitimate purpose of "prevent[ing] charlatans from grabbing the veteran's education money" (App. A, *infra,* p. 22a). The court's conclusion that these provisions nevertheless are unconstitutional simply rests upon a plain misunderstanding of the requirements of the Due Process Clause.[9]

1. This Court frequently has reiterated that social welfare classifications satisfy the requirements of due process if they have a rational basis. See, *e.g., Weinberger* v. *Salfi,* 422 U.S. 749, 770; *Richardson* v. *Bel-*

[8] In 1976, there were an estimated 1,294,267 veterans enrolled in institutions of higher learning. S. Rep. No. 94–1243, 94th Cong., 2d Sess. 89 (1976).

[9] Other courts have upheld the provisions challenged here. See *Rolle* v. *Cleland,* 435 F. Supp. 260 (D. R.I.), appeal pending, C.A. 1, No. 77–1422; *Fielder* v. *Cleland,* 433 F. Supp. 115 (E.D. Mich.), appeal pending, C.A. 6, No. 77–1478; *Hunter* v. *Cleland,* N.D. Ala., No. C.A. 77–P–0433–NE, decided November 7, 1977. See also *Dodd* v. *Rott,* E.D. Wisc., No. 77–C–142, decided September 7, 1977.

cher, 404 U.S. 78, 81; *Dandridge* v. *Williams,* 397 U.S. 471, 487. Thus the Court summarized last Term in *Mathews* v. *DeCastro,* 429 U.S. 181, 185:

> The basic principle that must govern an assessment of any constitutional challenge to a law providing for governmental payments of monetary benefits is well established. Governmental decisions to spend money to improve the general public welfare in one way and not another are "not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment." *Helvering* v. *Davis,* 301 U.S. 619, 640. In enacting legislation of this kind a government does not deny equal protection "merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' " *Dandridge* v. *Williams,* 397 U.S. 471, 485.

The district court in this case, however, refused to apply the "rational basis" test, because in the court's view the importance of the educational benefits at issue called for the somewhat stricter scrutiny that the court believed this Court applies in cases involving classifications based upon gender or legitimacy. The district court committed several errors in this chain of reasoning. First, the court's implicit premise that the 85–15 requirement and the two-year rule will operate to deprive veterans of educational benefits to which they

otherwise would be entitled was erroneous: these statutory provisions simply channel the veterans' educational efforts toward courses that are likely to be more worthwhile, without depriving veterans of assistance. Second, the "rational basis" test would apply even if veterans' entitlements to educational benefits genuinely were at stake: "the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing * * * social and economic legislation." *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1, 35. Third, whatever the appropriate standard of review may be in cases involving classifications based upon gender or legitimacy (see *e.g., Craig* v. *Boren,* 429 U.S. 190, 212–213 (concurring opinion of Mr. Justice Stevens); *Trimble* v. *Gordon,* 430 U.S. 762, 767), the "rational basis" test propounded in *Dandridge* v. *Williams* and other similar cases not involving classifications based upon the accident of birth remains "the constitutional test * * * applied in cases like this." *Califano* v. *Jobst,* No. 76–860, decided November 8, 1977 (slip op. 7).

For the reasons discussed below (pp. 10–15, *infra*), the district court correctly determined that the classifications challenged are rational. The court acknowledged that its decision with regard to constitutionality turned upon its choice of a stricter standard of review, stating that "[i]f the level of judicial scrutiny applied in cases such as *Dandridge* v. *Williams* is the law for this case, then the decision should be different" (App. A, *infra,* p. 31a). The court's rejection of the applicability of the "rational basis" test was so clearly erroneous that, in light of the court's determination that

the statutes have a rational basis, summary reversal appears warranted.

2. The 85–15 requirement and the two-year rule are rationally based.

a. The current provisions establishing the 85–15 requirement and the two-year rule are the products of a series of legislative decisions strengthening the safeguards against abuses of the program of veterans' educational benefits.[10] The forerunner of the current 85–15 requirement was enacted when Congress extended educational benefits to veterans of the Korean conflict. The House Select Committee to Investigate Educational Training and Loan Guarantee Programs under the GI Bill, which conducted an investigation into abuses of the World War II GI Bill, had recommended the enactment of a provision limiting educational benefits to courses offered by public schools and colleges and to courses offered by private schools that had been in

[10] Legislation which would further amend these provisions is now pending. Section 305(a)(1)(A) and (B) of H.R. 8701, 95th Cong., 1st Sess., the GI Bill Improvement Act of 1977, would authorize the Administrator to waive the two-year rule if he determines waiver to be in the best interests of the veteran and the federal government. Section 305(a)(2) of the bill provides that the 85–15 requirement generally would be inapplicable to courses offered by an institution where no more than 35 percent of the students receive veterans' educational benefits. Pending completion of further studies, Section 305(a)(3) would exclude from the 85 percent ceiling nonveteran students who receive other federal educational benefits.

On November 3, 1977, the House passed H.R. 8701 with amendments (123 Cong. Rec. H12139–H12161 (daily ed., November 3, 1977)), and on November 4, 1977, the Senate agreed to the bill as amended (123 Cong. Rec. S18812–S18821 (daily ed., November 4, 1977)), thus clearing the measure for presentation to the President. The President has not yet approved H.R. 8701, which was submitted to him as an enrolled bill on November 15, 1977. We will inform the Court promptly of the President's action.

successful operation for at least one year and had maintained an enrollment of at least 25 percent nonveteran students. See S. Rep. No. 94–1243, 94th Cong., 2d Sess. 88 (1976). In response to this recommendation, Congress enacted the first version of the 85–15 requirement, which applied only to nonaccredited courses below the college level offered by proprietary institutions. Pub. L. 82–550, 66 Stat. 667. This requirement, that a course be found worthwhile by a substantial number of students not subsidized by the federal government before the Administrator authorizes payment of veterans' educational benefits for the course, was intended as "a way of protecting veterans by allowing the free market mechanism to operate" (S. Rep. No. 94–1243, *supra,* at 88).[11]

A review of this provision during consideration of the 1974 GI Bill amendments led to the extension of the 85–15 requirement to courses offered by accredited

[11] The considerations underlying imposition of the 85–15 requirement have been summarized as follows (S. Rep. No. 94–1243, *supra,* at 88):

> • • • Congress was concerned about schools which developed courses specifically designed for those veterans with available Federal moneys to purchase such courses • • •. The ready availability of these funds obviously served as a strong incentive to some schools to enroll eligible veterans. The requirement of a minimum enrollment of students not wholly or partially subsidized by the Veterans' Administration was a way of protecting veterans by allowing the free market mechanism to operate.
>
> The price of the course was also required to respond to the general demands of the open market as well as to those with available Federal moneys to spend. A minimal number of nonveterans were required to find the course worthwhile and valuable or the payment of Federal funds to veterans who enrolled would not be authorized.

proprietary institutions that do not lead to a standard college degree. Section 203(3) of Pub. L. 93–508, 88 Stat. 1582. Finally, in response to the Veterans Administration's finding of "increased recruiting * * * directed exclusively at veterans" (S. Rep. No. 94–1243, *supra,* at 89), Congress in 1976 extended the 85–15 requirement to courses leading to a standard college degree as well. The Senate Veterans' Affairs Committee recommended approval of the amendment, noting its agreement with the view stated by the Veterans Administration that " 'if an institution of higher learning cannot attract sufficient nonveteran and nonsubsidized students to its programs, it presents a great potential for abuse of our GI educational programs.' " *Ibid.*"

The 1976 amendment altered the method of computing the 85–15 requirement, to include for the first time students receiving federal grants from agencies other than the Veterans Administration within the 85 percent ceiling. The Senate Committee reasoned that including all direct federal grants that need not be repaid was consistent with the general purpose of the 85–15 requirement (*id.* at 89–90).[12] At the same time, Congress recognized the desirability of coupling this expansion of the 85–15 requirement with a provision per-

[12] The Committee emphasized that such an extension of the 85–15 requirement would not be "onerous," because veterans no longer comprise a major portion of the students attending institutions of higher learning. S. Rep. No. 94–1243, *supra,* at 89. In 1947, 46.7 percent of students attending institutions of higher learning were receiving veterans' benefits; in 1976, only 11.5 percent of such students were receiving veterans' benefits. *Ibid.*

[13] The Senate Committee noted that only about 14 percent of students enrolled at institutions of higher learning received such grants. S. Rep. No. 94–1243, *supra,* at 89.

mitting administrative flexibility (*id.* at 90), and it accordingly permitted the Administrator to waive that requirement when he finds it "to be in the interest of the eligible veteran and the Federal Government." 38 U.S.C. 1673(d), as amended."

b. The forerunner of the current two-year rule, Pub. L. 81–266, 63 Stat. 653, also was enacted based upon experience with administration of the World War II GI Bill. That statute prohibited payments to institutions that had been in operation for less than one year. Like the 85–15 requirement, this provision was intended to protect veterans by allowing "the free market mechanism to operate and weed out those institutions who could survive only by the heavy influx of Federal payments." S. Rep. No. 94–1243, *supra,* at 128.

Public and other tax-supported schools were exempted from this rule by Pub. L. 81–610, 64 Stat. 337, which reflected Congress' belief that the abuses this restriction was intended to curb had in most cases involved only private institutions. S. Rep. No. 94–1243, *supra,* at 128. Section 227 of the Korean Conflict GI Bill, Pub. L. 82–550, 66 Stat. 667, extended the requirement to two years. In reporting favorably on this measure, the House Veterans' Affairs Committee noted that it provided "a real safeguard to assure sound training for the veteran, at reasonable cost, by seasoned institutions." H.R. Rep. No. 1943, 82d Cong., 2d Sess. 30 (1952).

[14] The 1976 amendment exempted farm cooperative training programs from the 85–15 requirement in reliance on advice from the Veterans Administration that such programs are primarily designed by state and local education and agriculture officials to serve veterans. S. Rep. No. 94–1243, *supra,* at 90.

In 1976, the two-year rule was made applicable to branches of private institutions located beyond normal commuting distance from the main campus and to branches of public or tax supported schools located outside the taxing jurisdiction. This provision was enacted in response to problems arising in connection with the "spectacular" increase in veterans' enrollment in schools establishing multibranch campuses. S. Rep. No. 94–1243, *supra,* at 129. The Senate Veterans' Affairs Committee reported (*ibid.*):

> Certain institutions, both public and proprietary, have suddenly developed many branch campuses throughout the United States. For the most part, these schools also have entered into extensive recruiting contracts directed almost exclusively at veterans. The Veterans' Administration, in a favorable report to the amendments proposed by this section, stated that:
>
> In recent months, a number of instances have been brought to our attention which represent abuse of our educational programs. Some of these cases involved contracting between nonprofit schools and profit schools or organizations whereby courses designed by the latter are offered by the non-profit, accredited school on a semester- or quarter-hour basis. In others, there are arrangements between nonprofit, accredited schools and outside profit firms whereby the latter, for a percentage of the tuition payment, perform recruiting services primarily for the establishing of these

> branch locations for the school. These recruiting efforts are aimed almost exclusively at veterans.

The Committee found that this situation created great potential for abuse, and it recommended enactment of the narrowing amendment.

c. As the foregoing demonstrates, the history of both the two-year rule and the 85–15 requirement amply supports the conclusion that they are reasonably related to the prevention of wasteful expenditures of veterans' educational benefits. Due process requires nothing more. See pp. 7–10, *supra.* As this Court stated in *Weinberger* v. *Salfi, supra,* 422 U.S. at 777:

> The question is whether Congress, its concern having been reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, could rationally have concluded both that a particular limitation or qualification would protect against its occurrence, and that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule.[15]

[15] Moreover, Congress could properly enact safeguards to combat the particular abuses it had detected in the administration of the veterans' educational benefits programs even though similar restrictions had not been applied to the payment of other federal educational benefits. This Court often has recognized that Congress may deal with a problem "one step at a time," by selecting "one phase of one field and apply[ing] a remedy there, neglecting the others." *Jefferson* v. *Hackney,* 406 U.S. 535, 546; *Williamson* v. *Lee Optical Co.,* 348 U.S. 483, 489. Veterans' benefits account for more than half of all federal expenditures for post secondary education. See Statement of the Administrator of Veterans' Affairs

CONCLUSION

Probable jurisdiction should be noted.[16]

Respectfully submitted.

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NOVEMBER 1977.

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before the Subcommittee on Postsecondary Education, House Committee on Education and Labor, 95th Cong., 1st Sess., p. 2 (June 16, 1977). The Due Process Clause does not require Congress to ignore the abuses detected in a program of this magnitude until it is prepared to legislate regarding abuses, not yet detected, in other similar programs.

[16] In the alternative, the Court may consider summary reversal to be appropriate. See pp. 9–10, *supra*.

APPENDIX A

Johnnie L. FRANCIS, Robert L. Martin, John L. Hughley, Cornell L. Conroy, and the National College of Business

v.

Max CLELAND, Administrator, Veterans Administration, A. H. Thornton, Director, Veterans Administration Center.

No. Civ 76-5085.

United States District Court,
D. South Dakota.

June 25, 1977.

MEMORANDUM OPINION

BOGUE, District Judge.

I.

This action was commenced by four armed forces veterans and an educational institution which enrolls veterans. Plaintiffs' theory is simply that the challenged sections of the Veterans' Education and Employment Act of 1976 conflict with the federal Constitution; hence, they ought be declared null and void and defendants ought be enjoined from enforcing them.

II.

Plaintiffs filed their complaint asking for injunctive relief on December 31, 1976. On December 31, 1976,

this Court entered a temporary restraining order enjoining defendants from enforcing the challenged sections as they applied to these plaintiffs. A hearing on the application for a preliminary injunction was set for January 17, 1977. At said hearing plaintiffs came forward with evidentiary matter (some witnesses and many exhibits) by which they tried to establish the prerequisites for continuing injunctive relief. Plaintiffs at that hearing asked for additional time to present evidence. Defendants argued vigorously that the taking of any evidence was of no possible benefit as the only thing then before the Court was a legal question; namely, whether or not the challenged pieces of legislation were rationally related to some legitimate governmental objective. Their point was well taken insofar as their motion to dismiss raised a purely legal question. However, as to whether or not continued injunctive relief was proper, this Court determined that it would be most fair to everyone to continue the hearing until the earliest convenient moment at which time each party would have opportunity to put in whatever evidence seemed material and relevant. The restraining order was left in effect pending further order of the Court and February 7, 1977, was set for the next hearing date.

On February 7, 1977, plaintiffs put in some evidence and defendants put on one witness. This Court then denied defendants' motion to dismiss. Defendants had moved earlier to consolidate the hearing on the application for preliminary injunctive relief with the hearing on the merits; and there being no opposition to

such consolidation motion, defendants' motion was granted.

Subsequently, plaintiffs moved for leave to file an amended complaint stating that they wanted to amend to conform to the evidence submitted. Leave was granted. An amended complaint was thereupon filed. Plaintiffs also filed a motion to reopen which this Court denied. Defendants moved to dismiss the amended complaint and also moved in the alternative for summary judgment. Briefs are all in, and the case is in a posture for final disposition on the merits.

III.

[1] Plaintiffs allege that jurisdiction exists under 28 U.S.C. § 1331 and under 28 U.S.C. § 1361. It appears from the briefs that defendants are not making an issue of jurisdiction. We think plaintiffs' reliance upon 28 U.S.C. § 1331 is well-placed, and proceed on the theory that a federal question has been presented.

Although plaintiffs allege damages in excess of $10,000.00, we make no finding as to the monetary amount in dispute. We deem it sufficient to note that 28 U.S.C. § 1331(a) as amended by Public Law 94–574, section 2, provides that no jurisdictional amount is necessary in any action predicated on § 1331 and brought "against the United States, any agency thereof, or any officer or employee thereof in his official capacity."

IV.

This lawsuit presents a challenge to three specific

provisions of the Veterans Education and Employment Act of 1976. These are:

(A) Section 205(d) of Public Law 94–502 which amends 38 U.S.C. § 1673(d);

(B) Section 509(b) of Public Law 94–502 which amends 38 U.S.C. § 1789; and

(C) Section 307 of Public Law 94–502 as it amends 38 U.S.C. § 1724.

The changes made by each of these amendments will be outlined separately.

A. Title 38 U.S.C. § 1673(d) embodies what is commonly known as the 85–15 rule. The Administrator is directed to disapprove a veteran's enrollment in any course for which he is not already enrolled if more than 85 percent of the students enrolled in that course are subsidized in whole or in part by the federal government or the educational institution itself. Disapproval would mean, of course, that G.I. Educational Benefits would not be paid unless the veteran found some approved courses. Thus the 85–15 rule is an attempt to force upon courses a market test; *i.e.* the theory behind the legislation is that if a course can attract a certain percent of paying students, then it is probably less likely to be a gimmick to attract veterans' dollars and more likely to be a quality course.

Prior to the amendment of 1976, 38 U.S.C. § 1673(d) read in relevant part as follows:

> (d) The Administrator shall not approve the enrollment of any eligible veteran, not already enrolled, in any course which does not lead to a standard college degree and which is offered by a proprietary profit or proprietary nonprofit educational institution for any period during which the Administrator finds that more than 85 per centum of the students enrolled in the course are having all or part of their tuition, fees, or other charges paid to or for them by the educational institution or the Veterans' Administration under this title.

Subsequent to the amendment of 1976, § 1673(d) reads in relevant part:

> The Administrator shall not approve the enrollment of any eligible veteran, not already enrolled, in any course . . . for any period during which the Administrator finds that more than 85 per centum of the students enrolled in the course are having all or part of their tuition, fees, or other charges paid to or for them by the educational institution, by the Veterans' Administration under this title and/or by grants from any Federal agency.

The significance of this 1976 amendment to § 1673 is twofold:

(1) the section is extended to cover courses not previously covered, and

(2) the allowable composition of the 85 percent group (which may be subsidized in one form or another) is altered.

Prior to the 1976 amendment the 85–15 rule pertained to courses offered by proprietary profit and proprietary nonprofit educational institutions if the courses led to something less than a standard college degree. The latest amendment extends the 85–15 rule to courses offered by public, tax-supported schools as well as to courses of other institutions not supported by taxes even if the courses, at either type of school, lead

to a standard college degree. In effect, § 205(d) of P.L. 94–502 extends the 85–15 rule to courses offered by all institutions of higher learning, the rest of the "educational universe." (Wolowitz, T273)

The second change in § 1673 is more significant for the present lawsuit. Under the law before the 1976 amendment the computation of 85 percent of the students, which could permissibly be subsidized in any course, was done without reference to students receiving federal grants other than veterans' benefits. As of December 1, 1976, the 85 percent must be computed differently. Students receiving aid from any federal agency or from the school itself are all thrown over into the potential 85 percent category; hence, at least 15 percent of the students enrolled in a course must be financed by their own resources, parents or some source other than the educational institution or the federal government.

B. Title 38 U.S.C. § 1789 embodies what is commonly referred to as the two-year rule. The two-year rule means basically that the Administrator is required to disapprove a veteran's enrollment in courses (hence his benefits) if the course has not yet been offered for two years. Some exceptions are allowed. The theory is the same as that underlying the 85–15 rule; namely, to force a course to survive a market test before G.I. Bill dollars start supporting it.

Prior to the amendment of 1976, 38 U.S.C. § 1789 stated as follows:

> § 1789. Period of Operation for approval. (a) The Administrator shall not approve the enrollment of an eligible veteran or eligible person in any course

> offered by an educational institution when such course has been in operation for less than two years.
> (b) Subsection (a) shall not apply to—(1) any course to be pursued in a public or other tax-supported educational institution;
> (2) any course which is offered by an educational institution which has been in operation for more than two years, if such course is similar in character to the instruction previously given by such institution;
> (3) any course which has been offered by an institution for a period of more than two years, notwithstanding the institution has moved to another location within the same general locality, or has made a complete move with substantially the same faculty, curricula, and students, without change in ownership;
> (4) any course which is offered by a non-profit educational institution of college level and which is recognized for credit toward a standard college degree; or
> (5) any course offered by a proprietary nonprofit educational institution which qualifies to carry out an approved program of education under the provisions of subchapter V or VI of chapter 34 of this title (including those courses offered at other than the institution's principal location) [38 USCS §§ 1690–1693 or 1695–1697A] if the institution offering such course has been in operation for more than two years. (Oct. 24, 1972, P.L. 92–540, Title III § 316(2), 86 Stat. 1087.)

Subsection (a) set out a general rule, and subsection (b) provided several exceptions to the rule.

The new law cuts back on exceptions by qualifying subsection (b). Subsection (b) is qualified by a new subsection (subsection (c)) which states:

> Notwithstanding the provisions of subsection (b) (1), (2), (3), or (4) of this section, the provisions of subsection (a) shall apply to any course offered by a branch or extension of—
>
> (1) a public or other tax-supported institution where the branch or extension is located outside of the area of the taxing jurisdiction providing support to such institution; or
>
> (2) a proprietary profit or proprietary nonprofit educational institution where the branch or extension is located beyond the normal commuting distance of such institution.

This legislation extends the two-year rule to courses not heretofore covered, *i.e.* certain courses offered by public tax-supported institutions and certain courses offered by private schools even though the courses are recognized for credit toward a standard college degree. Public schools may offer courses in branches or extensions anywhere within their taxing jurisdiction without having veterans who enroll in them be subject to the two-year rule. Other schools can branch out within commuting distance (25 or 30 miles according to testimony) without triggering the two-year rule for veterans who enroll in courses offered at such a branch or extension.

C. Title 38 U.S.C. § 1724 is aimed at an objective different from that underlying the 85–15 and two-year rules. While the latter two rules attempt to insure quality courses, § 1724 attempts to insure that the enrolled veteran actually does something constructive while he is in school. Section 1724 attempts to insure that each veteran, instead of merely enjoying the academic environment, makes definite progress toward an educational goal.

Prior to the 1976 amendment, 38 U.S.C. § 1724 read as follows:

> The Administrator shall discontinue the educational assistance allowance on behalf of an eligible person if, at any time, the Administrator finds that according to the regularly prescribed standards and practices of the educational institution he is attending, his conduct or progress is unsatisfactory.
>
> The Administrator may renew the payment of the educational assistance allowance only if the Administrator finds that—
>
> (1) the cause of the unsatisfactory conduct or progress of the eligible person has been removed; and
>
> (2) the program which the eligible person now proposes to pursue (whether the same or revised) is suitable to the person's aptitudes, interests, and abilities.

One qualifying sentence has now been added and it states:

> Unless the administrator finds there are mitigating circumstances, progress will be considered unsatisfactory at any time an eligible person is not progressing at a rate that will permit such person to graduate

within the approved length of the course based on the training time as certified to the Veterans' Administration.

In essence, the Congress set out to define "unsatisfactory progress." In doing so, time limits will be set insofar as a course of study will have an approved length; deviation will be regarded as dereliction and benefits will be withdrawn.

V.

As stated earlier, each of the three enumerated sections of the Veterans' Education and Employment Act of 1976 is challenged on the theory that each conflicts with one or more of the amendments to the United States Constitution. Preliminary to an in-depth analysis of such claim, it is essential to resolve the issue of which of these plaintiffs, if any, has brought a concrete case or controversy rather than an abstract question of law to this Court, *i. e.* who, if anyone, is so situated that he has standing to make these challenges.

VI.

[2] The standing issue necessitates two separate levels of inquiry; indeed, as the United States Supreme Court has recently observed when a standing issue was raised:

> [T]wo distinct standing questions are presented. . . . and they are these: *first*, whether the plaintiff-appellees allege "injury in fact," that is, a sufficiently concrete interest in the outcome of their suit to make it a case or controversy subject to a federal court's Art. III jurisdiction, and *second*, whether as

> a prudential matter, the plaintiff-appellees are proper proponents of the particular legal rights on which they base their suit. (Emphasis added.) *Singleton v. Wulff*, 428 U.S. 106, 112, 96 S.Ct. 2868, 2873, 49 L.Ed.2d 826 (1976) *citing Data Processing Service v. Camp*, 397 U.S. 150, at 152–153, 90 S.Ct. 827, at 829, 25 L.Ed.2d 184 (1979); *Flast v. Cohen*, 392 U.S. 83, 99, 88 S.Ct. 1942, 1952, 20 L.Ed.2d 947 (1968); and *Barrows v. Jackson*, 346 U.S. 249, 255, 73 S.Ct. 1031, 1034, 97 L.Ed. 1586 (1953) wherein the two separate criteria for standing are distinguished.

The issue of standing having been contested by defendants, we deem it proper at this point not only to examine plaintiffs' allegations, but also to determine as matters of fact whether plaintiffs meet the standing requirements set out in *Singleton v. Wulff*.

[3, 4] A. The requirement of injury in fact is based on the Art. III requirement of a case or controversy; *Data Service Processing v. Camp, supra.* Without injury in fact there can be no case or controversy in the constitutional sense. The injury need not necessarily be economic. *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972); *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973) (hereinafter SCRAP). Neither the degree of harm nor the significance of the grievance are required to be quantitatively measured when a court examines the first element of the standing test. *SCRAP*, 93 S.Ct. at 2417, n.14. Nevertheless, a plaintiff must allege and, if the point is controverted, must prove that some con-

crete injury has either been inflicted upon him or will immediately be inflicted upon him if the Court does not protect him.

[5] 1. Plaintiff Johnnie Francis, after his discharge from the United States army, tried several business ventures which failed. Mr. Francis was advised that his business prospects would be improved if he obtained some business training, so with that purpose in mind he enrolled at the National College of Business (hereinafter N.C.B.). He studied for six quarters and drew G.I. educational benefits during that time.

At the time of Mr. Francis' testimony in court, he was not enrolled, but had reapplied. He had no idea whether he had been accepted or not, but was definitely operating on the assumption that the 85–15 rule was somehow a barrier to the continuation of his business education. Plaintiffs produced no evidence, however, to show that Johnnie Francis' enrollment in any particular course would be disapproved by the Administrator on the basis of the 85–15 rule or the two-year rule.

The effect of the new law has not been linked to the situation of Johnnie Francis. He has some vague apprehensions, but no injury in fact. To assert that injury to him would likely occur would be, on this record, pure conjecture. We must conclude, therefore, that Johnnie Francis has not presented a concrete case or controversy and has no standing to challenge 85–15 or the two-year rule. Not being enrolled, he is assuredly in no position to challenge 38 U.S.C. § 1724, the progress requirement.

[6] 2. Plaintiff Cornell L. Conroy is presently enrolled at N.C.B. and is drawing G.I. educational benefits. The modified 85–15 rule and the modified two-year rule do not apply to a course in which a veteran is already enrolled. At present Mr. Conroy is even more removed from injury in fact traceable to these rules than is Johnnie Francis. We must hold therefore that Cornell Conroy has no standing to challenge either 85–15 or the two-year rule.

With respect to 38 U.S.C. § 1724, however, his position must be viewed differently. That section could rightfully be challenged, not by someone hoping to enter a course of study, but rather by someone hoping to remain in a course of study when his progress was judged unsatisfactory. If there were evidence tending to show that Mr. Conroy was not progressing toward his goal within the time limits approved by the Administrator, then he would be an ideal plaintiff to challenge 38 U.S.C. § 1724.

As the record stands now, we have no evidence that Mr. Conroy is progressing less rapidly than N.C.B. or the Veterans Administration thinks he ought. We have no evidence whatever that his benefits might be terminated for failure to progress rapidly enough; hence, as to 38 U.S.C. § 1724 we must also conclude that Mr. Conroy has no standing to sue because he has neither alleged nor proved injury in fact.

[7] 3. Plaintiff Robert L. Martin is on active duty in the United States Air Force. He was enrolled part-time at N.C.B. in 1976; he dropped out sometime in September and has not applied for re-enrollment at any N.C.B. branch.

Presently, this plaintiff is seeking an early separa-

tion (he still has approximately twenty-two months active duty) and hopes to return to his home in Baldwin City, Kansas, where he would be able to attend the Shawnee Mission branch of N.C.B. Because the Shawnee Mission extension, at the time of the hearing, had not yet been in operation for two years, the contemplated move could put Mr. Martin into a position in which he would be out of the Air Force but would not be able to get G.I. educational benefits for attendance at Shawnee. We have no evidence that the early separation will occur, however, and Mr. Martin has not even made inquiries as to whether he could be admitted to the Shawnee Mission branch of N.C.B.

A concrete case or controversy concerning 85–15 and the two-year rule is lacking and standing to challenge those sections must be denied. For the reasons discussed in Mr. Francis' case, this plaintiff has no standing to challenge 38 U.S.C. § 1724.

[8] 4. Plaintiff John L. Hughley did not testify at the hearing; accordingly, his position must be sketched from the uncontroverted assertions of his affidavit. He enrolled at N.C.B. in 1975, it is implied in the affidavit that he is still enrolled there, and he expresses grave concern about his future if his educational benefits are cut off.

As with Cornell Conroy, some change in his situation would have to occur before the 85–15 rule or the two-year rule would pose any threat to his benefits. Having no evidence that such a change is imminent, we can only conclude that plaintiff Hughley has alleged no injury in fact and consequently has no standing to challenge the 85–15 rule or the two-year rule. For the

reasons stated in our discussion of Mr. Conroy's situation, we likewise conclude at this point that John L. Hughley has no standing to challenge 38 U.S.C. § 1724.

[9] 5. N.C.B. is a nonprofit South Dakota corporation engaged in the business of higher education. John W. Hauer, president of N.C.B., testified at length about the programs offered by N.C.B., the investments made for the education of veterans and the immediate injury that would occur if the temporary restraining order were lifted. According to his testimony, investments in programs designed for the education of veterans is substantial; at least $680,000 has been invested in programs specifically designed to meet the needs of veterans. Veterans' responses have been good; consequently, the night school program in Rapid City and the courses at most of the branches are filled mostly by veterans.

Mr. Hauer testified that the situation of N.C.B. was such that application of the 85–15 rule would immediately put in jeopardy each and every program run by the school with two possible exceptions: the day school program in Rapid City and the program offered at a branch in Phoenix, Arizona.

His testimony relating to the effect of the two-year rule was similar to his testimony about the 85–15 rule. Because seven of N.C.B.'s thirteen extensions were, at the time of the hearing, less than two years old, it is plain that courses offered at these branches could not be approved for veterans. It was admitted, of course, that the extensions are all beyond commuting distance from the main campus in Rapid City.

From the record this Court finds with reference to

N.C.B.: this educational institution has a great financial investment in the education of the veterans and, if 85–15 and the two-year rule, or either, is applied to N.C.B., direct and immediate economic injury will occur. We conclude on the basis of these findings that the first half of the standing test has been passed by N.C.B. Insofar as N.C.B. seeks to challenge 85–15 and the two-year rule.

N.C.B. has, however, produced on the record no evidence of any injury caused by or likely to be caused by the application of 38 U.S.C. § 1724. In regard to that section, the first requirement for standing is missing and standing to press that claim will, accordingly, be denied.

B. Having found injury in fact in regard to N.C.B., a more difficult issue must be confronted; namely, whether N.C.B. is the proper proponent of the particular legal rights upon which the suit is based. The lawsuit is based upon several legal rights among which are: (1) the right to due process of law, (2) the right to equal protection of the law,[1] (3) the freedom (right) of association, (4) the right to travel, and (5) the right of privacy. Plaintiff N.C.B. also claims that the challenged legislation is: (6) an unlawful delegation of power, and (7) that it allows unlawful federal control of a private educational institution.

With the possible exception of the last claim, *supra*, these asserted rights are not asserted to be rights of N.C.B. which are being violated by the new veterans'

[1] Plaintiff's eighth claim for relief in their Amended Complaint appears to rest on the same legal theory as their second claim for relief, that is, the theory that equal protection principles are violated.

bill. In the well-pleaded amended complaint, plaintiffs plainly assert that the rights being violated are veterans' rights, not the rights of the institutional plaintiff. We are faced then with a peculiar dilemma: the rights asserted are those of veterans, but the only imminent injury we have found at this point is the threat of financial ruin for N.C.B. The question, therefore, is whether or not N.C.B., as an institution which provides services to veterans, can couple its potential injury with the veterans' constitutional rights and thereby become a proper proponent of the legal rights upon which the lawsuit is based. This Court has concluded that N.C.B. can properly link its injury with the students' rights and thereby gain standing in federal court.

[10] The key is the *jus tertii* concept which has recently been applied in *Craig v. Boren,* 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976) and was explained in greater detail in *Singleton v. Wulff, supra.* It is a general rule that federal courts will not resolve controversies on the basis of the rights of third persons not parties to the lawsuit. *Barrows v. Jackson,* 346 U.S. at 259, 73 S.Ct. at 1036 (1953). The rule, however, has an exception.

[11] A litigant will be allowed to invoke the *jus tertii* doctrine, allowing him standing on the basis of the third person's rights, when two specific factual determinations are made. First, it must be determined that the litigant's activity is so bound up with the right of the third person that the litigant will be directly affected by the outcome of the suit, and is so situated as to become fully, or nearly, as effective an advocate

as the person whose rights are asserted. Thus the nature of the relationship is crucial. *Singleton v. Wulff, supra.* Second, there must exist a genuine obstacle that prevents the third party from being the most effective proponent of his own rights. In this situation that party in court becomes, as by default, the best advocate. *Singleton v. Wulff, supra.*

The case before the Court presents a situation to which the *jus tertii* concept is applicable. The relationship between N.C.B. and veterans is definitely such that the litigants' activities (education) are inextricably bound up with the veterans' rights. N.C.B. is in a position to be a very effective advocate for veterans' rights. Moreover, there is definitely an obstacle that prevents veterans from effectively asserting their rights. In *Singleton v. Wulff* the Supreme Court recognized "imminent mootness" as an obstacle. In this suit, there is the obstacle posed by the converse of the mootness doctrine, *i. e.* ripeness. A student would not have a ripe controversy unless a course were disapproved. If he commenced a lawsuit at that point, the educational opportunity would no doubt be gone by the time a final decision was made. Thus, as a practical matter, a veteran who actually needs the V. A. funds for school at a special point in time has little chance of challenging any legislation.

This Court concludes, therefore, that N.C.B. has standing to sue and advocate the rights of veterans on the basis of the *jus tertii* doctrine. Though not always labeled as applications of the *jus tertii* doctrine, the principle itself has a long history. In 1927 in *Pierce v. Society of Sisters,* 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed.

1070, the Supreme Court recognized the standing of two private schools to assert the constitutional rights of their students and the students' parents when such rights were being deprived by a state statute requiring universal attendance at public schools. The schools combined their economic injury and the students' constitutional rights to get standing in federal court. *See also Barrows v. Jackson,* 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586, wherein Supreme Court recognized the standing of an owner of real property subject to a restrictive covenant to sue on the basis of the constitutional rights of a third party purchaser; *Akron Board of Education v. State Board of Education of Ohio,* 490 F.2d 1285 (1974) *cert. denied* 417 U.S. 932, 94 S.Ct. 2644, 41 L.Ed.2d 236, wherein the Sixth Circuit recognized that a municipal school board and its superintendent had standing to assert the constitutional rights of the district's children; and *Singleton v. Wulff, supra,* wherein physicians challenging a state law prohibiting Medicaid payments for non-therapeutic abortions gained standing because the doctors showed that their economic injury and their patients constitutional rights were inextricably intertwined.

Most recently in *Craig v. Boren, supra,* the Oklahoma beer vendor was allowed standing by coupling the constitutional rights of Oklahoma males between the ages of 18 and 21 with the constriction of the plaintiff's market caused by the challenged statute that prohibited sale of 3.2 beer to males of that age bracket. Again, the litigants' economic injury coupled with the third party's constitutional rights in a particular rela-

tionship was sufficient to provide standing to sue in federal court.

VII.

Several theories have been advanced by plaintiffs to support the contention that 85–15 and the two-year rule are unconstitutional. Plaintiffs have urged with particular vigor that 85–15 and the two-year rule violate their right to equal protection of the laws; and as this Court perceives the issues, plaintiffs' most meritorious arguments have been those based upon an equal protection theory. Therefore, this Court elects to first examine the claims urged in light of the equal protection doctrine insofar as it is incorporated into the due process clause of the fifth amendment.

[12] We begin with the assumption that the due process clause of the fifth amendment incorporates the general principle of equal protection; namely, that persons similarly situated should be treated similarly. See *e.g. Bolling v. Sharpe,* 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954); *U. S. Dept. of Agriculture v. Moreno,* 413 U.S. 528, 93 S.Ct. 2821, 2825 n. 5, 37 L.Ed. 2d 782 (1973). The standards to be used for testing the constitutionality of federal classifications under the fifth amendment are virtually identical to the standards to be used in determining whether or not a state classification violates the equal protection clause of the fourteenth amendment. *Frontiero v. Richardson,* 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973). Our primary task is to ascertain what standards ought to be applied to test the classifications made by the challenged legislation.

The law of equal protection has changed greatly over the past century, and in recent years this particular branch of the law has evolved very rapidly to cover dimensions of our social, political and economic life which were heretofore beyond the ambit of equal protection. There does not at present appear to be unanimous agreement among the members of the Supreme Court as to the state of the law of equal protection. *See e. g. Craig v. Boren, supra,* where Justices Stewart, Blackmun, Powell and Stevens each wrote separate, concurring opinions and the Chief Justice and Justice Rehnquist wrote separate, dissenting opinions. This Court is obliged to search the case law and reason by analogy to reach a just result here. We readily admit that we are plowing new ground in an era when some of the old reference points are tending to fade away.

VIII.

The traditional approach to equal protection questions was to apply the standard set out in *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61, 78–79, 31 S.Ct. 337, 55 L.Ed. 369 (1911). The essence of that test is that legislation must be reasonable, not arbitrary or capricious, in making classifications among persons. Under the *Lindsley* approach, a challenged classification will be sustained if any state of facts can reasonably be conceived in support of it. One challenging a classification bears the burden of showing that it is arbitrary.

The prevailing and continuing concept of the traditional approach has been that of "rational relationship" or "substantial and fair relationship" between a

legitimate, governmental objective (easy to postulate) and a specific piece of legislation. The very nature of the concept allows for flexibility and adaptability; it also allows for easy judicial abdication. Thus, almost anything can pass the most minimal level of scrutiny which is allowable within the concept of rational relationship.

To apply this minimal level of review to the present lawsuit, the reasoning process must be as follows: (1) establish the purpose of the legislation; (2) examine the nature of the class created; and then (3) make inquiry to determine how, if at all, the two are linked together by reason.

The purpose of the legislation (both 85–15 and the two-year rule) is plain to this Court. As stated earlier in this opinion, both laws are an attempt to insure that veterans enroll in quality courses if federal dollars are going to help support those courses. Conversely, it can be said that the purpose of these laws is to prevent charlatans from grabbing the veteran's education money. These are the immediate, remedial goals of the legislation. As remedial measures they are intended to advance the ultimate goal of the legislation giving veterans educational benefits, the goal of helping veterans individually to improve themselves and their lot in society.

During the hearings some effort was directed toward demonstrating that there was no rational relationship between the problem of recouping overpayments to veterans and the 85–15 and two-year rules. That is certainly true, but as the government pointed out, 85–15 and the two-year rule are aimed at another problem

entirely; specifically, the problem of insuring quality education. For our purposes, overpayments are irrelevant. We must consider the link, if any, between the classifications made by the laws and the remedial purposes of those laws.

The classification complained of in this lawsuit is the classification of veterans receiving educational benefits apart from all other persons receiving federal funds to subsidize their educations. The 85–15 rule and two-year rule will under no circumstances operate to the detriment of individuals going to school on federal funds other than V. A. benefits. In short, there is a different treatment of persons based upon the type of federal subsidy for education which they receive.

The crux of the problem is in determining whether or not veterans and non-veterans getting federal money for education under different programs are really similarly situated. We conclude that they are. All are beneficiaries of one and the same thing: social legislation that is aimed at raising the educational level and hence the opportunities and capacities of a certain segment of the populace. In either case we are dealing with governmental largess. *cf.* C. A. Reich, "The New Property," 73 Yale Law Journal (1964). V. A. benefits have been called gratuities. ***Milliken v. Gleason,*** 332 F.2d 122, 123 (1st Cir. 1964), ***cert. denied*** 379 U.S. 1002, 85 S.Ct. 723, 13 L.Ed.2d 703 (1965). Veterans' educational benefits are a statutory entitlement as are benefits created by other social legislation, and we can see no reason in this case to distinguish them from other types of benefits under different names that subsidize higher education. By treating V. A. benefits

as governmental largess, however, this Court does not imply that recipients have no protected interest whatever in their continuation.

We have, therefore, a class of persons who are recipients of government largess for the purpose of furthering their education; within that class the recipients of one particular type of largess are singled out for special treatment. Congress has made a special class out of veterans receiving government funds for higher education in an effort to shield and protect every member of that class from abuses perpetrated upon them by unscrupulous recruiters who would otherwise entice them to enroll in substandard courses.

Under the minimum requirements of the rational relationship test discussed, *supra,* can this classification pass muster? We must ask whether any state of facts reasonably may be conceived to justify the discrimination. *McGowan v. Maryland,* 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961). Using that formulation of the applicable law, the answer to the question posed is necessarily affirmative.

All that is required are two assumed facts. First, one must assume that the market test really does work in education in the manner in which Congress apparently believes it does; in other words, courses at least two years old will be safer (of higher quality) than new courses, and courses where friends, relatives or students pay the total cost for at least 15 per cent of enrollees will be of higher quality than courses supported almost exclusively by veterans. Second, one must assume that veterans will be more gullible or more prone to abuse their benefits than other beneficiaries of government largess. On those two assumptions alone, a bridge of reasonable relationship can be built between the classification created by the legislation and the purpose to be achieved by the legislation.

If the minimum level of review available under the rational relationship test is the applicable standard of review in this case, plaintiffs ought to be sent home empty-handed. We have not done so for the reason that we believe something more is required; the standard of review to be applied must be more intense than that heretofore discussed.

IX.

[13] The traditional test for reviewing equal protection questions has been refined and developed by the United States Supreme Court in two respects: (1) A statutory classification based upon suspect criteria will be in jeopardy unless the state (government) can demonstrate a compelling interest as justification for said classification; (2) A classification affecting fundamental rights will likewise be in serious trouble unless a compelling governmental interest is demonstrated.

It is quite apparent that the classification complained of in this case is by no stretch of the imagination "suspect". Veterans as a class have no history of deprivation of rights by reason of their status as veterans. The consequences of being classified as veterans do not approach the consequences of classification by race, which is the only classification which can be termed "suspect" with any certainty. *See Graham v. Richardson,* 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971); *cf.*

Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971).

The Supreme Court has declined to hold that education is a fundamental right. *San Antonio School Dist. v. Rodriguez,* 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973). That being the state of the law, we cannot proceed to assert that monetary benefits for higher education are a fundamental right; hence, the strict scrutiny test is not triggered by an alleged deprivation of education benefits.

It is noted that plaintiffs also contend that the fundamental right of interstate travel is impinged upon. On the basis of *Shapiro v. Thompson,* 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969), and *Dunn v. Blumstein,* 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972), they contend that this fundamental right must not be restricted in any manner, and on the basis of the right to travel they would have us invoke the strict scrutiny test. We have considered this idea and find it to be without merit.

No one could seriously argue that the right to interstate travel is less than fundamental. Before making any strict scrutiny of the legislation, however, it is necessary to make a preliminary search to discover whether or not this right is even arguably impinged upon. A cursory inquiry reveals the following: (1) The 85–15 rule has only the most attenuated connection with interstate travel; the most we could say is that a veteran residing in a state where the schools had a relatively low veteran population would be risking possible denial of benefits if he (she) contemplated moving to a state where schools had a relatively high veteran population.

(2) The nexus between the two-year rule and interstate travel is a little more obvious; yet the chain of reasoning between the rule and any possible impingement is again very attenuated. One would have to assume the existence of veterans in one particular state who seek to move to a second state wherein there existed no (or few) courses two years old or more that would meet the needs of the veterans in question. We have nothing to verify that kind of assumption.

A veteran could certainly protest that he wants to travel to some point in a foreign state and that, in the absence of an acceptable course at that situs, he would be deterred from moving. The right to travel, however, deals only with the right to travel across interstate lines, and does not include any inherent right to equal social and economic advantages at all points within the foreign state into which one hopes to travel.

Plaintiffs have also raised the right to associate freely and the right of privacy as potential fundamental interests that are infringed upon by the challenged legislation. We are unable to find a nexus between these rights in their present dimensions and the challenged rules.

At this juncture, therefore, we must conclude that although many ideas have been put forward, none carries enough weight to create in the mind of this Court the belief that a fundamental interest is at stake. Therefore, we must strike from consideration the strict scrutiny test as a proper standard for judging the classification herein presented to us.

X.

[14] During the 1970s there has been much discussion among commentators and court watchers on the question of whether or not in equal protection cases a standard of review somewhere between "strict scrutiny" and minimal inquiry in search of a "rational relationship" either has been constructed or is now emerging. One view is that a "middle tier," a medium level of review has come into being. *Reed v. Reed, supra,* and its progeny down to *Craig v. Boren, supra,* are accordingly viewed as examples of a "middle tier" approach. Justice Powell, concurring in *Craig v. Boren,* acknowledged this commonly articulated view of the Court's work and commented upon it as follows:

> As has been true of *Reed* and its progeny, our decision today will be viewed by some as a "middle-tier" approach. While I would not endorse that characterization and would not welcome a further subdividing of equal protection analysis, candor compels the recognition that the relatively deferential "rational basis" standard of review normally applied takes on a sharper focus when we address a gender-based classification. So much is clear from our recent cases. *Craig v. Boren,* Justice Powell concurring, 429 U.S. at 211, 97 S.Ct. at 464, see note.

The Supreme Court has, particularly in cases involving gender-based classifications, used an "elevated standard of scrutiny"[2] when the facts of a case are such as to

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[2] The phrase is from *Craig v. Boren, supra,* Mr. Justice Rehnquist dissenting, 429 U.S. at 216–218, at 97 S.Ct. at 467.

render the deferential rational relationship test inappropriate.

At this time it does not appear that there exists a verbal formula generally agreed upon that fairly conveys the meaning of this elevated standard of review. in *Craig v. Boren,* the Court required that a law creating a class based on gender be "substantially related" to an "important governmental objective." In *Reed v. Reed,* the Court required a "fair and substantial relation" between the legislation and the objective of the legislation. *Reed citing Royster Guano Co. v. Virginia,* 253 U.S. 412 at 415, 40 S.Ct. 560 at 861, 64 L.Ed. 989 (1920). The applicable standard must be gleaned from each case by looking at the concrete facts giving rise to the decision.

We think the following can be stated with reference to the state of the law in equal protection cases: (1) the two-tiered analysis of equal protection cases is an inadequate framework for analyzing recent work of the Supreme Court; (2) the framework is inadequate because some situations have been given less than strict scrutiny but more than minimal scrutiny; and (3) the standard of review for cases that do not fit the old mold is a pliable standard that is not easily captured but tends to be shaped by both the character of the class involved, and the seriousness of the interest allegedly impinged upon.

This pliable standard of review is evident in *Trimble v. Gordon.* —— U.S. ——, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977), where Mr. Justice Powell, writing for the majority in an opinion that struck down a classification based upon illegitimacy, stated:

> "[T]his Court requires at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose." . . . In this context, the standard just stated is a minimum; the Court sometimes requires more. "Though the latitude given state economic and social legislation is necessarily broad, when state statutory classification approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny . . ." quoting *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 at 172, 92 S.Ct. 1400 at 1405, 31 L.Ed.2d 768 (1972).

The case now before the Court is one where the interest at stake "approaches fundamental and personal rights." V. A. educational benefits can make the difference between a higher education that imparts marketable skills and no training for any sort of permanent occupation. In today's specialized society, higher education or training may not be "fundamental" within the narrow legal meaning of that term, but it is certainly essential to employment which will adequately support an individual and his or her family. The scrutiny required when such interests are at stake may not be the strictest but it is much more than the minimum.

In *Craig v. Boren* the class involved (sex) was not suspect, but it came close to being suspect. The interest involved was not fundamental, but rather far from fundamental, *i.e.*, the interest in legally buying 3.2 beer between the ages of 18 and 21. Here we have the converse. The class is not suspect, but rather far from suspect. The interest is close to fundamental. In this situation it would appear that the standard of review should be comparable to that applied in *Craig v. Boren*.

The government's objective is to reduce fraudulent and wasteful expenditures of money on bogus courses that lead nowhere—a praiseworthy objective. This remedial objective must, of course, be viewed in the context of the larger objective of veterans' programs; namely, to aid veterans in improving their capacities and opportunities by education. It is necessary to determine whether the challenged legislation bears a substantial relation to both the remedial goal and the more primary goal itself.

The challenged legislation could indeed eliminate bogus courses, but in the process, courses, and perhaps institutions, which especially serve veterans will be eliminated also. The challenged statutes are an example of legislative overkill. Fraud and waste are eliminated at the cost of eliminating quality educational opportunities for veterans. A statute that thus overreaches bears something less than a substantial relationship to important governmental objectives; hence, we must hold that the 85–15 rule and two-year rule are unconstitutional.

We are cognizant of the fact that social legislation in the past has not been subjected to as critical a level of scrutiny as that which we have herein applied. *See Dandridge v. Williams,* 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970). If the level of judicial scrutiny applied in cases such as *Dandridge v. Williams* is the law for this case, then the decision should be different.

We think the standard has changed since the time cases such as *Dandridge* were decided. Our rationale for concluding that this change has occurred is derived from our analysis of *Reed v. Reed* and its progeny. In

cases where the class distinctions are not based upon suspect criteria, but are close to being suspect, an intense review is required. We accept the proposition urged by plaintiffs that there has likewise been an elevation of the standard by which classifications are judged when interests impinged upon come close to interests categorized as fundamental.

One additional factor that has influenced this Court's decision should be noted; namely, the double-edged manner in which the new 85–15 rule is used. A veteran's enrollment cannot be approved for a course where more than 85 per cent of the students are subsidized in whole or in part by the educational institution, V. A. benefits, or grants from any federal agency. The recipients of all benefits for education from the federal government are thrown together with veterans for purposes of calculating the 85 per cent. But, when time comes for disapproving courses for veterans, then the drawing of class lines suddenly changes; then veterans stand alone to be cut off from benefits. This double-edged manner in which 85–15 is used is obnoxious; it is repugnant to the principle of equal protection.

The 85–15 rule looks innocuous at first glance. The more one ponders 85–15, however, the more troublesome it becomes. What the government gives on the one hand to needy students can arbitrarily cut off veterans who might be equally needy. If aid from federal agencies and educational institutions were to be directed heavily toward one poverty-stricken area to boost the fortunes of young persons hoping to get a higher education, veterans planning on an education could be frozen out indefinitely. The 85–15 rule has a built-in capacity to

sting veterans the worst when others are helped the most.

The foregoing contains this Court's findings of fact and conclusions of law and shall constitute the same.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

FILED
June 24, 1977
WILLIAM J. SRSTKA
CLERK
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Johnnie L. Francis, Robert L. Martin, John L. Hughley, Cornell L. Conroy, and the National College of Business, Plaintiffs, vs. Max Cleland, Administrator, Veterans Administration, A. H. Thornton, Director, Veterans Administration Center, Defendants.	CIV76-5085 JUDGMENT AND ORDER

For the reasons stated in the accompanying Memorandum Opinion;

IT IS HEREBY ADJUDGED AND DECLARED that 38 U.S.C. § 1673(d) as amended by Section 205 of P.L. 94-502 (the 85-15 rule) and 38 U.S.C. § 1789(c) as amended by Section 509 of P.L. 94-502 (the two-year rule) are unconstitutional; and Plaintiff National Col-

lege of Business is granted the following injunctive relief:

IT IS ORDERED AND DECREED that Defendants be and hereby are permanently restrained and enjoined from enforcing 38 U.S.C. § 1673(d), or enforcing any certification or reporting obligation imposed thereby, and

IT IS ORDERED AND DECREED that Defendants be and hereby are permanently restrained and enjoined from enforcing 38 U.S.C. § 1789(c) or enforcing any certification obligation imposed thereby;

IT IS FURTHER ORDERED that any relief prayed for and which is not granted in this Order be and hereby is denied.

Dated this 24th day of June, 1977.

BY THE COURT:
ANDREW W. BOGUE
United States District Judge

NOTICE OF ENTRY
Take notice that the original of this copy was filed and entered in the office of the Clerk of the United States District Court for the District of South Dakota on the 24th day of June, 1977.
William J. Srstka, Clerk

ATTEST:
WILLIAM J. SRSTKA, Clerk
By MARY A. SHULTZ, Deputy

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA WESTERN DIVISION

Johnnie L. Francis, Robert L. Martin, John L. Hughley, Cornell L. Conroy, and the National College of Business, Plaintiffs, vs. Max Cleland, Administrator, Veterans Administration, A. H. Thornton, Director, Veterans Administration Center, Defendants.	CIV 76–5085 NOTICE OF APPEAL TO THE SUPREME COURT

Notice is hereby given that the defendant hereby appeals to the Supreme Court of the United States, pursuant to 28 U.S.C. § 1252 from the judgment of the District Court entered in this action on June 24, 1977.

Dated this 22nd day of July, 1977.

DAVID V. VROOMAN
United States Attorney
By Jeffrey L. Viken
Assistant U.S. Attorney

APPENDIX D

38 U.S.C. (Supp. V) 1673(d), as amended by Pub. L. 94–502, Section 205, 90 Stat. 2387, provides in pertinent part:

(d) The Administrator shall not approve the enrollment of any eligible veteran, not already enrolled, in any course (other than one offered pursuant to subchapter V, any farm cooperative training course, or any course described in section 1789(b)(6) of this title) for any period during which the Administrator finds that more than 85 per centum of the students enrolled in the course are having all or part of their tuition, fees, or other charges paid to or for them by the educational institution, by the Veterans' Administration under this title and/or by grants from any Federal agency. The Administrator may waive the requirements of this subsection, in whole or in part, if the Administrator determines it to be in the interest of the eligible veteran and the Federal Government.

38 U.S.C. (Supp. V) 1789, as amended by Pub. L. 94–502, Section 509, 90 Stat. 2401, provides:

(a) The Administrator shall not approve the enrollment of an eligible veteran or eligible person in any course offered by an educational institution when such course has been in operation for less than two years.

(b) Subsection (a) shall not apply to—

(1) any course to be pursued in a public or other tax-supported educational institution;

(2) any course which is offered by an educational institution which has been in operation for

more than two years, if such course is similar in character to the instruction previously given by such institution;

(3) any course which has been offered by an institution for a period of more than two years, notwithstanding the institution has moved to another location within the same general locality, or has made a complete move with substantially the same faculty, curricula, and students, without change in ownership;

(4) any course which is offered by a nonprofit educational institution of college level and which is recognized for credit toward a standard college degree;

(5) any course offered by a proprietary nonprofit educational institution which qualifies to carry out an approved program of education under the provisions of subchapter V or VI of chapter 34 of this title (including those courses offered at other than the institution's principal location) if the institution offering such course has been in operation for more than two years; or

(6) any course offered by an educational institution under a contract with the Department of Defense that (A) is given on, or immediately adjacent to, a military base; (B) is available only to active duty military personnel and/or their dependents and (C) has been approved by the State approving agency of the State in which the base is located.

(c) Notwithstanding the provisions of subsection (b)(1), (2), (3), or (4) of this section, the provisions

of subsection (a) shall apply to any course offered by a branch or extension of—

(1) a public or other tax-supported institution where the branch or extension is located outside of the area of the taxing jurisdiction providing support to such institution; or

(2) a proprietary profit or proprietary nonprofit educational institution where the branch or extension is located beyond the normal commuting distance of such institution.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1977—250-471/94